STATE OF VERMONT

SUPERIOR COURT
Washington Unit

CRIMINAL DIVISION
Docket No: 815-7-18 Wncr

STATE OF VERMONT

v.

JERMAINE PARSONS,
Defendant

STATE'S RESPONSE
DEFENDANT'S MOTION TO
SUPPRESS & DISMISS

NOW COMES the State of Vermont, by and through its counsel, State's Attorney Rory T. Thibault, Esq., and sets forth the following response to the Defendant's motion:

REQUESTED RELIEF

As discussed herein, the Defendant's requested relief is moot based on the State's dismissal the charges in this docket, without prejudice.

FACTS

A. Substantive Facts relating to Stop, Search, and Arrest

1. The State relies on the factual recitation set forth in the Defendant's motion, dated March 31, 2019, drawn from the affidavit of probable cause of Officer (now Chief) Helfant and other discovery materials referenced. The factual recitation is supplemented in the following paragraphs.

2. The quantity of cocaine seized from the Defendant's shoe, when accounting for the weight of packaging, and seeing the actual size of the packaging in photographic form is likely beyond personal use, assuming the cocaine was intended to be manufactured into cocaine-base ("crack cocaine"). No direct evidence supports this conclusion, and the amount seized, excluding packaging, is likely double the misdemeanor weight threshold of 2.5gm.[1]

3. The quantity of oxycodone seized is within the misdemeanor threshold of weight and dosage as alleged in Count 3 of 3. The amount may be consistent with personal use, and the State notes the Co-Defendant's possession of snort tubes and pill grinders in the vehicle.

[1] As of this date, no laboratory testing to confirm the final weight of the cocaine has been completed. As discussed, infra, the State is dismissing Count 2 of 3 because the alleged possession of heroin alleged at arraignment is no longer supported by probable cause.

Figure 1: Seized Drugs from Defendant's Shoe

4. With respect to the Defendant's supplemental filing concerning the Defendant's revocation of consent, the State provides the following supplemental factual recitation.

5. The Defendant participates in a search of his person by Chief Helfant, captured on the body camera footage of Officer Gowans. This search occurred after the Defendant declined a search while still seated in the vehicle, which the Co-Defendant was providing consent for the officers to search (*See* Defendant's Ex. D, 6:00). Chief Helfant continues to suspect there are drugs on the Defendant's person, consistent with the information provided by the CI. Specifically, the following statements (or words in substantial effect) are made leading up to and during the search of the Defendant:

7:25 –	Off. Gowans - "I bet its in his back pocket or bag behind him." Off. Helfant – "I bet its in his crotch.";
8:30 –	Off. Helfant – "See if we can't get something for P.C. to get a warrant on him.";
13:00 –	Off. Helfant – "Okay, we have P.C." then reciting the reasoning for the stop, evidence obtained and informant information;
14:45 –	Off. Helfant – "Opportunity to get consent. Read him the *Savva* thing." Referencing, *State v. Saava*;

21:20 – Defendant – "you just searched me" or words to that effect, noting he had consented to a pat down upon exiting the vehicle;

21:50 – Search on the Defendant begins;

22:45 – Suspected mushroom located in the Defendant's right front pocket;

24:40 – Search of shoes begins, one at a time;

25:20 – Defendant – "Is this necessary right now.";

25:30 – Defendant – "I'm tired of this shit.";

25:37 – Defendant – "I'm done with this search.";[2]

25:40 – Off. Helfant – "Slide your shoe off."

26:18 – Off. Gowans arrests Defendant upon identifying suspected drugs in the Defendant's shoe.

B. Procedural History

1. In February 2019, the State did not object to the withdrawal of pleas of guilty in the matter of *State v. Inostroza*, Docket No. 877-7-18 Wncr. Central to the disposition in that matter was the apparent lack of consent provided by the Defendant with respect to the search of his bag in a vehicle that had been subjected to a stop by law enforcement. The conduct of Chief Helfant in that investigation raised multiple concerns, most notably an absence of consent to search the Defendant's bag, the failure to screen the operator of the vehicle for suspicion of driving under the influence of drugs, and the warrantless access of cellular phones inside the vehicle without affirmative consent.

2. These concerns were forwarded to the Office of the Attorney General, Criminal Division, for investigation, specifically, to evaluate the apparent inconsistency between the affidavit of probable cause and the body camera footage of Chief Helfant regarding whether the Defendant provided consent to search. At this time, the matter remains under review by the Office of the Attorney General and no findings have been presented.

3. Following the State's discovery and partial litigation of this issue, the undersigned directed Deputy State's Attorney Ashley Hill to review other drug

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[2] The Defendant's counsel has suggested that the Defendant states either "I'm done with this *search*" or "I'm done with this *shit*." Three deputy State's Attorneys were asked to independently listen to the audio, and shared in the conclusion of the undersigned that the word used by the Defendant is "search" – distinguishable from his prior usage of the word "shit."

cases involving Chief Helfant. This required review of multiple hours of body camera footage in several cases. In early March 2019, the issue raised in the Defendant's supplemental filing – his revocation of consent – was flagged.
4. It was further determined on March 11, 2019 that the body camera footage of Chief Helfant relating to the stop and arrest was not preserved or available from the Berlin Police Department. The body camera footage of Officer Gowans was available, although does not commence until after the stop has already been initiated.[3]

5. On March 19, 2019, the apparent continuation of the search following the Defendant's revocation of consent was referred to the Office of the Attorney General for inclusion into their investigation into Chief Helfant's conduct and accuracy of his affidavit in the matter of *State v. Inostroza.* The omission of any reference to the Defendant's equivocation and apparent unequivocal revocation of consent with respect to the search of the Defendant in the affidavit of probable cause was concerning in light of the conduct already under review.[4] Had these facts been known at the time of the case's referral, the State may have declined to prosecute.

6. Contemporaneously, counsel for the Defendant was informed of this referral and encouraged to review the body camera footage.[5]

7. During the course of considering the litigation of this matter, the State requested information on the CI from Officer Dan Locke of the Hardwick Police Department. The Hardwick Police Department was cooperative with our inquiry, however, noted that Officer Locke left the Department and is now a Deputy with the Lamoille County Sherriff's Department, and that he had maintained his CI files in the course of his transfer to his new department. Deputy Locke was contacted by our office and declined to provide the requested information concerning the CI. Accordingly, the State is unable to independently assess the reliability of the CI and his/her assertions with respect to this case.[6]

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[3] The Berlin Police Department conducted an inquiry into the unavailability of the file and did not find malfeasance, rather, the loss of data was attributed to an error in transfer from the Axon server to a local database used to store the voluminous data files associated with body camera footage.
[4] At this time, the review by the Office of the Attorney General remains in progress. No findings or recommendations have been made public or provided to the undersigned at the time of filing. The State is aware that Chief Helfant cooperated with the inquiry, and that the investigative component of the review is complete.
[5] The State did not immediately dismiss, pending the opportunity for the Attorney General to complete a full and impartial investigation, including an interview of Chief Helfant, and to allow for the Defendant and counsel to further explore the matter and request any relief desired. The State further conducted extensive research and review of the case law and applicable standards concerning revocation of consent, the inevitable discovery doctrine, and searches incident to lawful arrest, as described, *infra.*
[6] The CI is not under contract with the Office of the Washington County State's Attorney or an agency within this jurisdiction. Deputy Locke indicated to the staff member who contacted him that he would not want to disclose the CI file even if compelled to do so by a court order. The State assumes that disclosure of this individual could compromise other pending investigations or criminal matters, and the absence of this information or opportunity to fully explore the source of information

BASIS FOR STATE'S DISMISSAL OF CHARGES

Only in rare circumstances does the State file an explanation or detailed rationale for the dismissal of charges. Here, the issues raised in the Defendant's motion and the understandable public safety concerns associating with letting an alleged drug dealer not face consequence warrant a public record of the basis.

To be clear, the State does not concede that the challenges presented in the Defendant's initial motion would result in dismissal. However, the Defendant's revocation of consent is far more problematic and compels dismissal in this matter. Put another way, even if the State were to prevail on questions of the lawfulness of the stop and initiation of the search of the Defendant, the Defendant's revocation of consent is a matter unlikely to be overcome, and if overcome is at conflict with the prosecutorial standards of the Office of the Washington County State's Attorney.

A. Dismissal of Count 2 of 3

1. Count 2 of 3, possession of heroin, in violation 18 V.S.A. § 4233, is dismissed independent of any of the arguments raised by the Defendant. The substance visually appeared to be heroin, one of the drugs reported to be under the custody of the Defendant by the CI. The substance field tested as oxycodone, meaning the alternate theory, charged under Count 3 of 3 is the appropriate charge to proceed upon.

2. As the CI's credibility has not been subject to examination subsequent to the initial finding of probable cause, and no laboratory test has been completed to date, the State believes Count 2 of 3 is no longer supported by probable cause, and it is accordingly dismissed.

B. Lawfulness of the Stop

1. The State does not concede that the basis for the stop lacked reasonable suspicion or was unlawful.

2. In this matter, an investigatory stop on the Co-Defendant and Defendant based upon the reasonable suspicion that he had cocaine and/or heroin in his possession. Stops of this nature are often referred to as "interdiction stops." In this matter the stop was lawful, under both the U.S. and State of Vermont Constitutions, and there is not a clear basis for suppression of the evidence.

3. "Police officers may make an investigatory stop based upon a reasonable suspicion that the suspect is engaged in criminal activity." *State v. Lamb*, 168 Vt. 194, 196 (1998). Reasonable suspicion does not need to be based upon the officer's personal observations. *Id.* "An informant's tip, if it carries enough indicia of

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with respect to the stop in this case limits the ability to provide a complete response with respect to the first issue raised by the Defendant concerning the legality of the stop.

reliability, may justify a forcible stop." *Id.* (citing *State v. Kettlewell,* 149 Vt. 331, 335 (1987). Here, Chief Helfant acted upon what he believed to be reliable information from a CI controlled by another that Defendant was involved with possession of heroin and cocaine. Acting on the information from the CI, he initiated a stop upon corroborating the target vehicle and route of

4. Further, *State v. Paro,* 192 Vt. 619, 621 (2012), held that "for a police officer to effect a warrantless traffic stop the officer must have a reasonable and articulable suspicion of criminal activity." Likewise, the ability of law enforcement officers to "stop and temporarily detain a vehicle based on little more than a reasonable and articulable suspicion of wrongdoing" has long been established under Vermont law, subject to "the corollary requirement that the police intrusion proceed no further than necessary to effectuate the purpose of the stop." *State v. Sprague,* 175 Vt. 123 (2003) (citing *State v. Ryea,* 153 Vt. 451, 454 (1990).

5. Here, Chief Helfant was presented with the following facts from the CI, each of which was corroborated prior to initiation of the stop:

a. The vehicle registered to Ms. Salls was identified;

b. The vehicle, when stopped, was operating in a direction of travel consistent with a destination of Hardwick, Vermont;

c. The timeline for encountering the vehicle corroborated a short trip to the Berlin, Vermont area, specifically, it was seen heading southbound on VT-14 at 2:55am, and returned at 3:30am heading northbound; and

d. Upon passing the police cruiser, the vehicle pulled into a driveway in the town of East Montpelier, leading to the stop occurring at that location.

Accordingly, upon initiating the stop, Chief Helfant ascertained the information provided by the CI was consistent with his personal observations.

C. Lawfulness of Search and Defendant's Revocation of Consent

1. The State declines to conduct or provide a full rationale and analysis of whether initiation of the search was lawful or appropriate, because irrespective, any consent given was clearly and unequivocally revoked prior to the seizure of the drugs. Whether the Defendant said "I'm done with this *search,*" or "I'm done with this *shit,*" the operative term was "I'm done." Under the circumstances, a reasonable officer would have inquired into the voluntariness of the search, given the Defendant's nominal cooperation and willingness to participate in warrantless processing on scene.

2. "The touchstone of the Fourth Amendment is reasonableness ... the court has long approved consensual searches because it is no doubt reasonable for the police to conduct a search once they have been permitted to do so. The standard for

measuring the scope of a suspect's consent under the Fourth Amendment is that of objective reasonableness -- what would the typical reasonable person have understood by the exchange between the officer and the suspect." *Florida v. Jimeno*, 500 U.S. 248, 250-51 (1991). Further, "[a] consent that waives Fourth Amendment rights may be limited in scope and may be withdrawn by an unequivocal act or statement that clearly expresses the individual's desire not to be searched." *United States v. Wilmore*, 57 Fed. Appx. 949, 953 (2003) (citing *Jimeno, supra*).

3. The Defendant noted, as does the State, the holding in *State v. Tetreault*: "[a]n individual may limit or revoke his or her consent to a warrantless search. Although no magic words are required, it is generally agreed that "[a] defendant must make an unequivocal act or statement to indicate that consent is being withdrawn." 206 Vt. 366, 383 (2017). Mere reluctance, or indication of a general desire not to be bothered by a search are insufficient. *Id.; see also Id.* at 383-384 citing *State v. Milos*, 294 Neb. 375, 389 (2016) ("Milos placed his hand in the same pocket that the officer was trying to search, thereby interfering with the officer's ability to search. The officer then removed Milos' hand. These actions are inconsistent with a consensual search.").

4. The Exclusionary Rule established in *State v. Oakes*, 157 Vt. 171 (1991) is broader than provided for under analogous federal law. In *Oakes* the Vermont Supreme Court recognized the existence of an independent exclusionary rule that was derived from the Vermont Constitution, and calls for unfavorable treatment of evidence that is illegally seized evidence, generally calling for inadmissibility for all purposes. "Evidence obtained in violation of the Vermont Constitution, or as the result of a violation, cannot be admitted at trial as a matter of state law." *State v. Badger*, 141 Vt. 430, 452-53 (1982). Further,"[i]ntroduction of [illegally obtained] evidence at trial eviscerates our most sacred rights, impinges on individual privacy, perverts our judicial process, distorts any notion of fairness, and encourages official misconduct." *Id.*

5. The State is not persuaded that the caselaw providing for searches incident to arrest, inevitable discovery, or other "savings" measures provided for could cure the defect here. The Defendant was not in fact under arrest at that point, and the basis for tying the Defendant to the drugs or suspected drugs recovered from the Co-Defendant's purse was slim. Moreover, arrest was not effectuated when the suspected mushroom was located on the Defendant.

D. The interests of justice in this matter

1. The Defendant's record and actions leading up to the felony possession of cocaine on July 2, 2019 are condemnable. Notwithstanding his poor character and criminogenic propensities suggested by his record, he remains fully entitled to the protections and liberties afforded by the U.S. Constitution and Vermont Constitution.

2. To the extent this case is one that is "on the line" or a "close call," it is precisely cases such as these that require and demand prosecutorial discretion. It is possible, though unlikely, the State could score a trifecta and overcome all of Defendant's challenges to the legality of search and arrest. Succeeding in such could serve to validate the approach taken in this case – which is inconsistent with the standard of care and due process expected by the Office of the Washington County State's Attorney. Further, it is deeply concerning that the reovocation of consent was not noted in the affidavit of probable cause or the case narrative referred to this office. The judgment and conduct of Chief Helfant during this stop is concerning, especially in light of his quotation of caselaw and standards during the stop and his 28 years of experience.

3. This dismissal is without prejudice and does not preclude the Attorney General or federal authorities from pursuing this matter, should either see fit. In summation, a variety of challenges call for dismissal of these charges. Dismissal should not be interpreted as weakness or lack of desire to aggressively uproot drug activity that is destroying the lives of residents in Washington County, rather the outcome here reflects the commitment this office has to the law.

CONCLUSION

WHEREFORE for the foregoing reasons, the State dismisses the charges without prejudice in this docket.

DATED in Barre, Vermont this 26TH day of July 2019.

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